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Supreme Court, U.S.
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No. 99-1314

IN THE

Supreme Court of the United States

ROBERTO TEFEL, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION

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ARGUMENT

The Government's response largely ignores Petitioners' showing that the Eleventh Circuit's opinion (1) contradicts prior rulings by this Court as to Petitioners' due process claim; (2) misapplies the estoppel precedent of this Court; and (3) conflicts with the estoppel jurisprudence of other Circuits. Instead, the Government devotes the bulk of its brief to an irrelevant discussion of the status of the individual claims of the named class representatives. Petitioners are a certified class of 40,000 plaintiffs, who continue to suffer the threat of deportation and other related harms. The Government's suggestion that this Court's certiorari review should turn upon an examination of claims of certain of the class representatives ignores this Court's explicit precedent making clear that the claims of the class members survive the purported resolution of any individual claims and remain worthy of this Court's review.

The Government's attacks upon the substance of Petitioners' claims are no more well-grounded. Just as the Eleventh Circuit did, the Government turns this Court's precedent on its head to suggest that it bars Petitioners' procedural due process claim when in fact it squarely supports it. As to Petitioners' estoppel claim, the Government entirely declines to address Petitioners' rebuttal of the single basis on which the Eleventh Circuit denied this claim. Moreover, it simply ignores the conflicts in the law of estoppel arising between the Eleventh Circuit's application of the law and that of several other Circuits.

1. The Government's Untested Appellate Assertion That Some (But Not All) Of The Class Representatives May Have Individually Obtained Relief Is Irrelevant And Does Not Denigrate The Continuing Legal Importantce Of This Case.

The Government devotes the bulk of its response to a suggestion that the validity of Petitioners' claims is somehow

reduced because some (albeit unquestionably not all) of the named class representatives allegedly may have been awarded some form of relief. This contention is meaningless to this Court's decision to grant certiorari, because (1) the class's claims survive any individual relief to the named representatives, and (2) the Government admits that some of the named representatives have not resolved their claims.[1]

a. Under This Court's Precedent, The Claims Of The 40,000 Class Members Remain Fully Active And Justiciable Even If Some Of The Individual Class Representatives Have Been Mooted

Under the explicit precedent of this Court established in *Sosna v. Iowa*, 419 U.S. 393 (1975), the Government's remarks that relief may have been obtained by some of the named class representatives are irrelevant to this Court's decision to award certiorari in this case. *See* Government Response ("Resp.") at 14-16. *Sosna* squarely held that an action brought by a certified class of plaintiffs survives the mooting of a named class representative's claims. This Court stated specifically that an Article III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna*, 419 U.S. *Id.* at 402. In *United States Parole Comm'n v. Geraghty*, the Court extended the rationale of *Sosna* to cases in which class certification has been denied. 445 U.S. 388, 404 (1980). In this case, of course, the Petitioners constitute a duly certified class, so the class's claims plainly survive any resolution of the individual representatives' claims, under *Sosna*. Moreover, even if the class certification is as flawed as the Government alleges (but Petitioners dispute), this Court's holding in *Geraghty* unquestionably states that the

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[1] Moreover, the Government's remarks as to the relief obtained by some of the named class representatives do not rely upon any evidence properly introduced at trial. These assertions were only introduced as the arguments of counsel on appeal, and they thus carry no weight.

claims of the Petitioners' class are still fully worthy of certiorari.

This Court recently reiterated the principles that animated *Sosna* and *Geraghty*, noting that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 120 S. Ct. 693, 709 (2000). The Government has not even attempted to make any such showing in this case. Plainly, the district court recognized that the 40,000 Petitioners in the certified class faced enormous harm beyond the individualized claims of the named class representatives. It found "powerfully persuasive" the claims detailed in its opinion as representing "a cross-section of the Plaintiff class. There are thousands of other cases that could be developed at the ultimate trial in this case." Petition Appendix ("Pet. App.") B at 83a. That court was fully aware that the relief afforded to some of the individual named Petitioners is hardly indicative of the treatment of the class as a whole. The district court specifically found that "The Defendants have respectfully, but forcefully, made it clear that they will continue to deport class members." *Id.* at 84a. Moreover, the class of 40,000 Petitioners has suffered other unredressed harms besides the threat of deportation, in such forms as denial of access to employment while proceedings were pending, expiration of claims by aged-out parties, and inability to pursue claims or benefits on behalf of family members.

Finally, Defendants' arguments are an invitation to abuse of the class action form. If they prevail, any defendant facing class litigation could escape accountability to the class by granting even small relief to the representatives.

b. As The Government Itself Concedes, At Least Two Of The Individual Class Representatives Indisputably Remain Active Plaintiffs

Even if the status of the individual class representatives' causes of action were in some way relevant to the Court's decision to grant certiorari in this matter, it is clear from the Government's own brief that this point is a diaphanous issue. Concededly, at least two of the named class representatives have not obtained any form of relief from deportation. Resp. at 14, 16.

Indeed, the district court had examined the claims of the named class representatives at length in its opinion, *including one of the individuals whom the Government admits is still facing deportation*, and found that each one had asserted valid claims through which to seek suspension of deportation. Pet. App. B at 74a-84a. The district court specifically described the situation faced by Ms. Khadijeh Aidinezhad, one of the two individual class representatives whose claims the Government admits are still unquestionably unresolved and unredressed. It noted that the "attorney for INS agreed that Ms. Aidinezhad would suffer extreme hardship if deported to Iran." The district court further found that Ms. Aidinezhad was an adequate class representative, because, *inter alia*,

> Ms. Aidinezhad is the sole care-giver and financial provider to her 79-year-old mother, a U.S. resident . . . Ms. Aidinezhad's mother requires constant medical attention and care and relies entirely on Ms. Aidinezhad to provide her with basic necessities and medicine . . . Ms. Aidinezhad hoped to continue her education in the United States and complete her master's degree, an option not available to women in Iran.
>
> If Ms. Aidinezhad is deported, she will lose the chance to continue her education, and more importantly, her elderly and dependent mother will

> lose the only financial support and care giver she has.

Id. at 79a. There has been no showing that any of these facts have changed. The same remains true for Subalecthumy Vengadasalam, the other named class representative conceded by the Government still to be in danger of deportation. *See* Resp. at 19 n.13. Even if this Court were inclined to review the status of the named class representative, the adequacy of those representatives is not in doubt.

2. The Government's Response Fails To Overcome Petitioners' Showing That They Have Raised A Valid Due-Process Claim Worthy Of This Court's Review

a. The Government's Response Misstates The Holding In *Dumschat*, Where This Court Squarely Stated That Due Process Protection Can Attach To The Right To Seek A Benefit, Even If The Award Thereof Is Discretionary

The Government's response attempts to craft a new due process rule in conflict with this Court's jurisprudence by ignoring the clear language of *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981). Repeating the error made by the Eleventh Circuit, the Government simply posits without support the notion that, because Petitioners do not have a due process right to *obtain* suspension of deportation, they must therefore have no protectable right to *seek* suspension. Resp. at 23. *Dumschat*, respectfully, reached precisely the opposite conclusion.

As Petitioners noted in their Petition, the Court in *Dumschat* affirmed the legal basis for distinguishing between the right to receive relief and the property or liberty interest in the right to seek relief: "We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond *the right to seek* commutation." Petition ("Pet.") at 11; *Dumschat* at 467 (emphasis added). Petitioners further showed that, in so ruling, *Dumschat* was one of a string of cases reaching

essentially this conclusion. Pet. at 11; *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *United States v. Nixon*, 418 U.S. 683, 695-69 (1974); *Ponte v. Real*, 471 U.S. 491, 498-99 (1985). The Government's attempt to distinguish some of these cases simply reiterates the same fallacy it made in discussing *Dumschat*, by incorrectly equating the right to obtain relief with the right to seek it.[2] Resp. at 23 n.14.

Moreover, Petitioners demonstrated that the Eleventh Circuit's opinion was both contrary to all of these cases from this Court and sharply at variance with cases from other Circuits. Pet. at 13-14. The Government attempts to address only a few of these cases and to distinguish them on factual grounds, but it cannot escape the clear holdings of these cases, which harmonize with *Dumschat*.[3]

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[2] For the same reason, the various cases cited by the Government in support of the proposition that Petitioners have no due process right to *receive* suspension of deportation are irrelevant to this Court's decision as to the granting of certiorari, because the right to receive suspension was and is, simply, not the issue in either *Dumschat* or this case. *See* Resp. at 21-22.

[3] The only case that the Government cites for of its suggestion that due process cannot attach to a right to seek a benefit is *Shvartsman v. Apfel*, 138 F.3d 1196 (7th Cir. 1998). The Seventh Circuit's opinion, of course, is not controlling upon this Court, and it is significantly limited in its analysis, insofar as it entirely fails to mention *Dumschat* or *Ponte*. Nonetheless, even *Shvartsman* recognized that, upon a sufficient showing of a property interest, due process protection can attach to particular procedures for seeking benefits. *Id.* at 1200. In that case, the plaintiffs were not able to show any such property interest, whereas the Petitioners in this case have presented considerable evidence of fees paid and worthwhile claims relinquished in order to seek suspension.

b. As The Eleventh Circuit And The District Court Found, The Petitioners' Claim Sounds In Procedural Due Process, Because The Harm Stems From The Government's Decision To Assign A Different Legal Significance To The Issuance Of An INS Order

The Government attempts to confuse the issue tendered for this Court's review by seeking, in contravention of the findings of both the Eleventh Circuit and the district court, to characterize Petitioners' due process claim as arising from "substantive," as opposed to procedural, due process. Resp. at 21. On its face, this suggestion is belied by the facts of this case. Petitioners' claims for relief, after all, arise from the Government's decision to assign a different legal significance to the Government's procedural act of sending an Order to Show Cause to Petitioners. Pet. App. B at 67a. In other words, as the district court found, the due-process "analysis . . . turns on whether someone is served with a charging document." *Id.* This is plainly a procedural distinction.

The Eleventh Circuit reached the same conclusion and squarely rejected the Government's contention. The section of its opinion dealing with Petitioners' claims is entitled "Procedural-Due-Process Claim," and the first sentence thereof analyzes "the procedural component of the Fifth Amendment's Due Process Clause." Pet. App. A at 24a, 27a, 28a.

c. The Statutory Change Referred To In The Government's Response Did Not Abrogate Petitioners' Property Interest, Because They Had Already Paid Over $1.7 Million In Fees And Had Abandoned Other Claims For Relief

The Government's response attempts to suggest that Petitioners have demonstrated no property interest protectable by due process. Resp. at 24-25. The district court, however, made extensive findings establishing protected property interests. It found that, collectively, individuals in the plaintiff

class had paid the Government over $1.7 million in fees seeking suspension of deportation, before the Government changed the stop-time rule and retroactively sought to bar these Petitioners from pursuing relief. Pet. App. B at 64a. It also found that many of the Petitioners abandoned other legal claims in order to pursue suspension. For instance, the district court noted with regard to one of the named class representatives that "[b]efore the Immigration Judge reviewed Ms. Aidenezhad's application for asylum, Ms. Aidenezhad withdrew her application for asylum and applied for and was granted suspension of deportation." *Id.* at 79a. These substantial payments and sacrifices, undertaken at the Government's encouragement, were held in the district court to have vested valuable property interests, protectable by procedural due process, in the 40,000 individuals in the class. *Id.*

3. The Government's Response Fails To Overcome Petitioners' Showing That They Have Raised Valid Estoppel Claims Worthy Of This Court's Review

a. The District Court Expressly Found That Petitioners Had Demonstrated A Likelihood Of Success on The Traditional Elements Of Estoppel, And The Eleventh Circuit Did Not Disturb That Holding

The Government's only response to the Petitioners' arguments in favor of certiorari on their estoppel claim attempts to raise an issue that even the Eleventh Circuit did not find persuasive: the suggestion that the traditional elements of estoppel are not present. Resp. at 27-28. This contention has no record support; the district court analyzed at great length each of the elements traditionally necessary to an estoppel claim and found that Petitioners had demonstrated a likelihood of success on every element. Pet. App. B at 68a-74a. The Eleventh Circuit apparently agreed, as it left these findings undisturbed. *See, e.g.*, Pet. App. A at 30a.

b. The Government's Response Fails To Address Petitioners' Showing (1) That The Eleventh Circuit Erred In Concluding That An Element Of "Affirmative Misconduct" Was Required By This Court's Precedent And (2) That It Misapplied That Element In Conflict With The Law In Other Circuits

The Government apparently concedes the Petitioners' central argument for certiorari on their estoppel claim by offering no response. As Petitioners pointed out, the Eleventh Circuit overturned the injunction as to Petitioners' estoppel claim on the sole grounds that, as a matter of first impression in that Circuit, this Court's jurisprudence required a showing of "affirmative misconduct" to estop the Government. Pet. at 16. Despite the absence of any findings by the district court, the Eleventh Circuit found that element lacking in this case as a matter of law.

As a threshold matter, Petitioners demonstrated that this Court's precedent did not require "affirmative misconduct" by the Government beyond the traditional elements of estoppel. Pet. at 17. Rather, this Court has explicitly declined to adopt an affirmative-misconduct element. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990).

Even if some form of "affirmative misconduct" were necessary to estop the Government as a general rule, Petitioners further showed that the Eleventh Circuit's application of that element was both erroneous under the circumstances of this case and in conflict with the manner in which several other Circuits had applied it. The Government did not address this point in its Response. Simply, the Second, Third, and Ninth Circuits had defined "affirmative misconduct" as including omissive conduct (such as the INS' failure to advise the Petitioners in this case) where an individual loses a right to benefits. *See* Pet. at 17-18. The First and Ninth Circuits additionally based the determination of affirmative misconduct upon a *factual* evaluation, which the Eleventh Circuit ignored by ruling, in the absence of

factual findings by the district court, that affirmative misconduct was not established as a matter of law. *See* Pet. at 19. Earlier, the Seventh Circuit ruled that affirmative misconduct may be found even if the Government did not violate its own applicable regulations. *See id.* These variant standards produce sharply differing results. They make certiorari as to Petitioners' estoppel claim appropriate in the interest of clarity, fairness and uniformity. *Barrett v. United States*, 423 U.S. 212, 215 (1976) (certiorari appropriate in case revealing "overtones of conflict" among the Circuits).

CONCLUSION

For the foregoing reasons, and for all of the reasons set forth in their Petition, Petitioners respectfully request that a writ of certiorari be issued to the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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